Volume 84
Issue 4 *Dickinson Law Review - Volume 84, 1979-1980*

6-1-1980

The Prisoner Transfer Treaty with Turkey: Last Run for the "Midnight Express"

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I. Introduction

On June 7, 1979, the United States and Turkey signed a bilateral treaty concerning the enforcement of penal judgments[1] that permits citizens of either country who are convicted of a crime in the courts of the other country to serve their prison sentence in their home country.[2] The treaty is a significant attempt to resolve a much-publicized problem[3] of great concern to both nations[4] — the special hardship of incarceration in a foreign country.[5] By its terms, the

1. Treaty on Enforcement of Penal Judgments, June 7, 1979, United States-Turkey, __ U.S.T. __, __ T.I.A.S. __, *reprinted in* TREATY WITH THE REPUBLIC OF TURKEY ON THE ENFORCEMENT OF PENAL JUDGMENTS, S. EXEC. DOC. BB, 96th Cong., 1st Sess. (1979) [hereinafter cited as Turkish Treaty].

2. A sister treaty that includes provisions for extradition and mutual assistance in criminal matters has also been signed with Turkey. TREATY ON EXTRADITION AND MUTUAL ASSISTANCE IN CRIMINAL MATTERS, June 7, 1979, United States-Turkey, __ U.S.T. __, __ T.I.A.S. __, *reprinted in* S. EXEC. DOC. AA, 96th Cong., 1st Sess. (1979). The sister treaty extends the list of extraditable offenses to include narcotics crimes, aircraft hijacking, obstruction of justice, bribery, and offenses that are punishable by a prison term exceeding one year. *Id.* art. 2(1)(a), app. The list of extraditable offenses now totals thirty-three.

The sister treaty also covers mutual assistance in criminal matters and is only the second of its type in the United States. Essentially, it replaces the traditional procedure of obtaining evidence from foreign countries with a more efficient method. In the past, a time-consuming rogatory letter (commission from one judge to another requesting him to examine a witness) was required. Under the treaty, either party may request assistance in criminal investigations including taking of testimony or statements of persons, *id.* art. 21 (3)(b), producing documents or articles of evidence, *id.* art. 21 (3)(c), and service of judicial documents, *id.* art. 21 (3)(e). In addition, the treaty provides for temporary transfer of an American defendant to Turkey to acquire testimony of a witness and permits the defendant to be present when the request for testimony is executed. *Id.* art. 32(1).

3. *See, e.g.,* B. HAYES, MIDNIGHT EXPRESS (1977). The book describes the author's successful escape from a Turkish prison after being incarcerated on charges of smuggling narcotics and was later made into a movie by the same name. *See* Maslin, *Review,* N.Y. Times, Dec. 14, 1978, at C 20, col. 1. *See also* note 39 *infra.*

4. *See* Turkish Treaty, *supra* note 1, at III, Letter of Transmittal, Message from the President of the United States to the Senate.

5. An estimated 2,200 American citizens are imprisoned in some seventy-five countries. *See* H.R. REP. NO. 720, 95th Cong., 1st Sess. 54 (1977) (statement of Warren Christopher, Deputy Secretary, Department of State), *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 3146, 3176. Mr. Christopher discussed the hardships in depth:

> There are special hardships involved in being in a prison abroad. It is difficult or impossible to maintain contact with one's family or friends. Language problems can make prison life more difficult. The isolation inherent in being imprisoned abroad can aggravate the always difficult problems of readjustment after release.
>
> Comparable hardships exist for foreigners in U.S. prisons even though there is

treaty was subject to ratification by both nations and became effective.[6]

The Turkish Treaty is the fifth in a series of bilateral prisoner transfer treaties that began in 1977 with the Treaty on the Execution of Penal Sentences between the United States and Mexico.[7] The Turkish Treaty, however, arises in a unique legal context. It is the first prisoner transfer treaty based upon the European Convention in International Validity of Criminal Judgments (European Conven-

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less publicity about them. The problem of prisoners, and the publicity they generate, has been a burden in our diplomatic relations.

The treaties and this implementing legislation will lift that burden.

Id. For further detail on the special hardships resulting from foreign incarceration, see *Transfer of Offenders and Administration of Foreign Penal Sentences: Hearings on S. 1682 Before the Subcomm. on Penitentiaries and Corrections of the Senate Comm. on the Judiciary,* 95th Cong., 1st Sess. 1, 120, 123, 129, 293 (1977).

6. Turkish Treaty, *supra* note 1, at art. XXIX(1), (2). The Turkish Treaty was reported by the United States Senate on November 20, 1979. 123 CONG. REC. S 17123 (daily ed. Nov. 20, 1979). The Treaty had been analyzed in Senate Foreign Relations Committee hearings on November 13, 1979. *Hearings on Nine United States Treaties on Law Enforcement and Related Matters Before the Senate Committee on Foreign Relations,* 96th Cong., 1st Sess. (1979) [hereinafter cited as *Ratification Hearings*]. The instrument of ratification was signed by President Carter on December 13, 1979. *United States Department of State Bulletin,* Feb. 1980, at 76.

Ratification of the Treaty was delayed in Turkey until recently by a combination of circumstances. After being signed by the Government of Turkey in June of 1979, it needed only to be ratified by the Parliament. The Parliament apparently had no objections to the Treaty but faced more pressing internal problems including a deteriorating economic situation. *See* Washington Post, Feb. 6, 1980 at 1, col. 4 (the government was confronted with an inflation rate of 70 percent). When the five-man National Security Council headed by General Kenan Evren seized power on September 12, 1980, it abolished the Parliament and assumed legislative functions. *See* New York Times, Oct. 9, 1980, at A3, col. 4.

The ruling junta subsequently gave top priority to salvaging Turkey's precarious economy. "Eroded by near 100 percent inflation, wobbling under the weight of billions of dollars of foreign debts, slowed by chronic inefficiencies, by 20 percent unemployment, and by rampant terrorism, the Turkish economy has long been in desperate need of repair." Christian Science Monitor, Sept. 16, 1980, at 1, col. 1. Because of these obstacles, many observers felt that prospects for early ratification of the Treaty were slim. Telephone interview with Ms. Zergun Tanyar, Second Secretary in Charge of Consular Affairs, Turkish Embassy, in Washington, D.C. (September 22, 1980). Nonetheless, on October 8, 1980, the National Security Council announced approval of the Treaty. *See* New York Times, Oct. 9, 1980, at A3, col. 4.

The question remains whether approval by the National Security Council without ratification by the Parliament is constitutional under Turkey's Anayasa (Constitution). *See* footnotes 50-51 and accompanying text *supra.* Given the present political situation, however, the Treaty's constitutionality is not likely to be challenged from within Turkey.

7. Treaty on the Execution of Penal Sentences, Nov. 25, 1976, United States-Mexico, 28 U.S.T. 7399, T.I.A.S. No. 8718, *reprinted in* H.R. REP. No. 720, 95th Cong., 1st Sess. 9-12 (1977) [hereinafter cited as Mexican Treaty]. The other treaties in the series included the following: Treaty on the Execution of Penal Sentences, July 6, 1979, United States-Peru, __ U.S.T. __, T.I.A.S. No. __, *reprinted in* S. EXEC. DOC. II, 96th Cong.,1st Sess. (1979); Treaty on the Execution of Penal Sentences, Jan. 11, 1979, United States-Panama, __ U.S.T. __, T.I.A.S. No. __, *reprinted in* S. EXEC. DOC. Z, 96th Cong., 1st Sess. (1979); Treaty on the Execution of Penal Sentences, Feb. 10, 1978, United States-Bolivia, __ U.S.T. __, T.I.A.S. No. __, S. EXEC. DOC. G, 95th Cong., 2d Sess. (1978) [hereinafter cited as Bolivian Treaty]; Treaty on the Execution of Penal Sentences, Mar. 2, 1977, United States-Canada, __ U.S.T. __, T.I.A.S. No. __, *reprinted in* H.R. REP. No. 720, 95th Cong., 1st Sess. 19-23 (1977) [hereinafter cited as Canadian Treaty].

The treaties with Mexico, Canada, and Bolivia are currently in force; those with Panama, Peru, and Turkey have not yet become effective. All six treaties utilize the original implementing legislation. 18 U.S.C.A. §§ 3100-3115 (West Supp. 1979).

tion).[8] It is also the first treaty of this nature between the United States and another party to the North Atlantic Treaty Organization Status of Forces Agreement (NATO SOFA).[9]

The continued validity of this entire series of treaties has recently been challenged in a federal district court decision. In *Velez v. Nelson,*[10] the court granted three prisoners transferred to the United States under the Mexican Treaty a writ of habeas corpus from federal prison on grounds that their consent to transfer was involuntary. The prisoners successfully contended that their consent could not be voluntary since mistreatment in foreign jails vitiated any choice concerning transfer.[11] Given the present precarious position of the treaty in Turkey, an affirmation of *Velez* could result in the demise of the treaty.[12] In light of *Velez* and other criticisms of the Turkish Treaty, this comment will examine the Treaty and the legal hurdles it may face in the courts.

II. Geneology and Background of the Turkish Treaty

A. The Mexican Treaty

An offspring of the Mexican Treaty, the Turkish Treaty represents the logical culmination of a chain of events that began in the early 1970's. At that time, both the American and Mexican governments implemented stringent measures to reduce drug traffic.[13] With

8. May 28, 1970, Europ. T.S. 70, 2 Council of Europe, European Conventions and Agreements 426 (1972) [hereinafter cited as European Convention]. *See* notes 31-36 and accompanying text *infra.*

9. The Status of Forces Agreement Between the Parties to the North Atlantic Treaty, June 19, 1951, 4 U.S.T. 1792, T.I.A.S. No. 2846, 199 U.N.T.S. 67 [hereinafter cited as NATO SOFA]. The signatories are Belgium, Canada, Denmark, Iceland, Italy, Luxembourg, the Netherlands, Norway, Portugal, the United Kingdom, and the United States. The Agreement went into force on August 23, 1953, and Turkey became a party by accession on June 17, 1954.

The NATO SOFA was intended to clarify the criminal jurisdiction that a foreign nation may exercise over friendly armed forces stationed within its borders during peace time. Holmes v. Laird, 459 F.2d 1211, 1212 (D.C. Cir.), *cert. denied,* 409 U.S. 869 (1972). When an American serviceman is alleged to have committed an offense against the law of a foreign nation, the SOFA governs the place of his pretrial confinement and specifies seven due process guarantees that the foreign court must follow during trial. NATO SOFA, art. VII(9)(a)-(g). In addition to uniformed members of the force, the NATO SOFA also applies to members of the civilian component and their dependents. NATO SOFA, art. I (1)(b), (c).

10. 475 F. Supp. 865 (D. Conn. 1979), *rev'd sub nom.,* Rosado v. Civiletti, No. 80-2001/3 (2d Cir. Apr. 23, 1980), *petition for cert. filed,* 48 U.S.L.W. _ (U.S. June 2, 1980) (No. 79-6690).

11. 475 F. Supp. at 874.

12. *See* note 6 *supra.* One party may terminate the treaty simply by giving prior written notice of its intention to the other party. The termination will take effect six months after receipt of the notification. Turkish Treaty, *supra* note 1, at art. XXIX (3). *See generally* Briggs, *Unilateral Denunciation of Treaties: The Vienna Convention and the ICJ,* 68 AM. J. INT'L L. 51 (1974). Mexico has recently lodged a formal protest over the case. *Ratification Hearings, supra* note 6, at 15 (statement of Michael Abbell, Director, Office of International Affairs, Criminal Division, Department of Justice).

13. The Nixon Administration declared an international war on drugs attempting to stop production of narcotics at their source. *See U.S. Citizens in Foreign Jails on Drug Related Charges: Hearings before the Senate Subcomm. on Foreign Assistance of the Comm. on Foreign Relations,* 95th Cong., 1st Sess. 1 (1977). *See also* N.Y. Times, Oct. 29, 1977, at 8, cols. 2-4.

the assistance of the Drug Enforcement Agency (DEA), the Mexican government vigorously attempted to eradicate drug production and the use of Mexico as a transshipment point in international drug traffic.[14] A by-product of these efforts was the apprehension of many United States citizens. By August 1977, the number of Americans held in Mexican jails had reached approximately 600.[15] The majority of these prisoners were convicted on drug charges, generally possession of marijuana or cocaine.[16] Subsequently, their families complained to the press and the State Department of mistreatment and inadequate living conditions in Mexican prisons.[17]

In response to the adverse publicity in the United States, the Mexican government proposed a prisoner exchange agreement with the United States to Secretary of State Kissinger in June 1976.[18] Following extensive hearings before several House and Senate committees,[19] both the Mexican Treaty and a similar treaty with Canada were ratified[20] and appropriate implementing legislation was enacted.[21] Congress' rationale for ratifying these treaties was essentially threefold: the treaties would increase the likelihood of rehabilitation of the offender;[22] improve bilateral relations between

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14. *Penal Treaties with Mexico and Canada: Hearings on Exec. D. and Exec. H Before the Senate Comm. on Foreign Relations,* 95th Cong., 1st Sess. 2 (1977) [hereinafter cited as *Senate Foreign Relations Hearings*] (prepared statement of Senator John Sparkman); *see also id.* at 11 (Mexico was the source of 80% of the illicit drugs entering this country at that time).

15. *See Implementation of Treaties for the Transfer of Offenders to or from Foreign Countries: Hearings on H.R. 7148 Before the Subcomm. on Immigration, Citizenship, and International Law of the House Comm. on the Judiciary,* 95th Cong., 1st Sess. 1 (1977) [hereinafter cited as *House Judiciary Hearings*]; *see also* N.Y. Times, Aug. 24, 1977, at A 4, col. 3.

16. N.Y. Times, Oct. 30, 1977, § 1, at 41, col. 1.

17. H.R. REP. NO. 720, 95th Cong., 1st Sess. 1, *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 3146, 3146.

18. *Senate Foreign Relations Hearings, supra* note 15, at 2 (prepared statement of Senator John Sparkman); 123 CONG. REC. 24,273 (1977) (remarks of Senator Lloyd Bentsen).

19. In late 1975 and early 1976 the House heard testimony substantiating prisoner complaints. *United States Citizens Imprisoned in Mexico: Hearings Before the Subcomm. on International Political and Military Affairs of the House Comm. on International Relations,* 94th Cong., 2d Sess. (1976). As a consequence of these hearings, a treaty between the United States and Mexico was prepared and forwarded to Congress in November 1976. The Senate Foreign Relations Committee held hearings on the treaty and a similar treaty with Canada in June 1977. *Senate Foreign Relations Hearings, supra* note 14, at 2. Since the treaties required implementing legislation, hearings were held on Senate Bill 1682 in July 1977. *Transfer of Offenders and Administration of Foreign Penal Sentences; Hearings on S. 1682 Before the Subcomm. on Penitentiaries and Corrections of the Senate Comm. on the Judiciary,* 95th Cong., 1st Sess 1. (1977) [hereinafter cited as *Senate Judiciary Hearings*].

20. The Mexican Treaty was unanimously ratified by the Senate on July 21, 1977. *See* 123 CONG. REC. 24,275 (1977). The Canadian Treaty was ratified July 19, 1977. *See* 123 CONG. REC. 23,730 (1977).

21. Act of Oct. 28, 1977, Pub. L. No. 95-144, 91 Stat. 1212 (codified at 10 U.S.C. § 955, 18 U.S.C. § 4100-4115, 28 U.S.C. § 2256). The legislation was intended to implement any future treaties. *See* H.R. REP. NO. 720, 95th Cong., 1st Sess. 28 (1977).

22.

> Offender rehabilitation which is one of the primary objectives of United States penal policy, is facilitated as a result of execution of penal sentences in an offender's own country. Rehabilitation is less likely to take place where the environment in which the offender finds himself is unfamiliar and sometimes hostile to him. Recipi-

the respective nations;[23] and foster humanitarianism.[24]

In operation, the treaties have fulfilled these expectations. Over 700 prisoners have transferred to their home countries since the program began.[25] Moreover, a State Department official has characterized the treaties as "a very good experience, beneficial to our foreign relations and to the individuals affected by those treaties."[26]

B. International Precedents

Although the United States had never entered into a bilateral pact of this nature prior to the Mexican Treaty,[27] the concept was not without precedent. Since 1948, the Scandinavian countries have pro-

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ents of benefits of this greater possibility for rehabilitation are: (1) the individual offender and (2) the community into which the offender will eventually return.

Id. at 4.

23.

> Incarceration of individual [*sic*] in prisons and institutions of a foreign country invariably have the effect of straining bilateral relations between the offender's home country and the foreign country. Conditions existing within a nation's penal facilities and their reform are not generally high on the list of its legislative priorities. As a result, despite good intentions, neglect is often found to exist in this area. The effects of this neglect is felt by foreign prisoners and is not conducive to good foreign relations.

Id.

24. "The most fundamental justification for offender exchange treaties is human rights. Incarceration in one's own country is severe enough punishment. Service of a custodial term in a foreign jail creates special hardships upon the individual offender, and his family." *Id.*

25. *Ratification Hearings, supra* note 6, at 19, 22. The actual tally is as follows: 431 Americans transferred from Mexico; 183 Mexicans transferred from United States; 63 Americans transferred from Canada; 43 Canadians transferred to Canada; 9 Americans transferred from Bolivia; and 3 Bolivians transferred to Bolivia. By November 13, 1979, a total of 732 prisoners had transferred. *Id.*

26. *Id.* at 27 (statement of James H. Michel, Deputy Legal Adviser, Department of State).

27. No precedent exists in the United States for a bilateral pact that would allow prisoners to serve foreign sentences in their home country, except an unimplemented provision in the Korean Status of Forces Agreement. Facilities and Areas and the Status of Forces in Korea Agreement, June 9, 1966, United States-Korea, 17 U.S.T. 1677, 1697-98, T.I.A.S. No. 6127, art. XXII(7)(b). That provision requires South Korea to give "sympathetic consideration" to any United States request to take custody of United States citizens sentenced by Korean courts under the terms of the agreement.

In the early 1950's the idea of a prisoner serving a foreign sentence at home was discussed briefly in the deliberations of the SOFA Working Group, but was abandoned. In their book STATUS OF FORCES AGREEMENT: CRIMINAL JURISDICTION (1957). Joseph Snee and H. Kenneth Pye discussed the circumstances of this event:

> It is interesting that no provision was inserted in the Agreement to take care of the . . . situation [of] handing an accused over to the authorities of the sending State [United States] for assistance in carrying out a sentence of imprisonment imposed by the courts of the receiving State [other NATO nations]. The Portuguese Representative, during the discussion of Article VII, paragraph 8, suggested the addition of a sentence to that paragraph to the effect that, in case of an offense punishable by a heavy sentence in the receiving State, steps could be taken to hand over the accused to the authorities of the sending State. It is not clear, however, whether he intended that the sending State should carry out a sentence imposed by the receiving State, or whether the purpose was to allow the receiving State to rid itself of an undesirable alien without at the same time obliging the sending State to see to the execution of the sentence. The amendment was withdrawn, the Chairman of the Working Group [incorrectly] pointing out that the question had been dealt with in Article III, paragraph 5 . . . .

Id. at 103 (footnote omitted).

vided for the exchange of prisoners by multilateral agreement.[28] The concept was further developed in 1964 when the Council of Europe entered into a convention[29] to resolve the difficulties that arose when the courts of one country placed on probation or parole an offender who subsequently returned to his home country. The convention authorizes the home country to supervise the returning offender and to imprison an offender who violates the terms of his parole or probation.[30]

More recently, the European Convention,[31] which has been adopted by nine countries including Turkey, outlined procedures for one nation's enforcement of another nation's criminal sanctions upon an offender. The European Convention encompasses the treatment of offenders who remain at large,[32] extends the reciprocity concept to the payment of fines in addition to the completion of prison terms,[33] and provides for the arrest of an offender at the request of another nation.[34] Similar to the Mexican and Canadian prisoner transfer treaties, the European Convention accords the transferring state the exclusive right to adjudicate any request for review of the sentence.[35] Unlike the Mexican and Canadian treaties, however, the European Convention establishes that the prerogative of amnesty or pardon is shared by both states. The Convention also enumerates grounds for nonenforcement of a sentence by the receiving state, including "where enforcement would run counter to the fundamental principles of [that state's] legal system."[36] As a signatory, Turkey desired to utilize the European Convention as the basis for the prisoner transfer treaty with the United States.[37] The two treaties are, therefore, quite similar in format.

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28. Convention Regarding the Recognition and Enforcement of Judgments in Criminal Matters, Mar. 8, 1948, Denmark-Norway-Sweden, 27 U.N.T.S. 117.

29. European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders, Nov. 30, 1964, Europ. T.S. 51, 2 Council of Europe, European Conventions and Agreements 201 (1972) [hereinafter cited as Supervision Convention]. The Scandinavian states of Denmark, Finland, Iceland, Norway, and Sweden have a similar arrangement called the Nordic Enforcement Law that is embodied in national legislation. *See, e.g.*, Law of May 22, 1963, [1963] Coll. Laws 399, *as amended by* Law of July 29, 1964, [1964] Coll. Laws 1265 (Sweden). *See* Grützner, *International Judicial Assistance and Cooperation in Criminal Matters,* in 2 A. TREATISE ON INTERNATIONAL CRIMINAL LAW 216 n.113 (M. Bassiouni & V. Nanda eds. 1973).

30. Supervision Convention, *supra* note 29, at art. 16. *See* Note, *"Justice with Mercy": The Treaties with Canada and Mexico for the Execution of Penal Judgments,* 4 BROOKLYN J. OF INT'L L. 246, 255 (1978).

31. European Convention, *supra* note 8.

32. *Id.* pt. II, § 1, art. 2(a).

33. *Id.* art. 2(b).

34. *Id.* arts. 31-36.

35. *Id.* art. 10(2).

36. *Id.* art. 6(a).

37. Turkish Treaty, *supra* note 1, at V, Letter of Submittal, Message From the Secretary of State to the President of the United States.

C. *Turkish Treaty Combines the Format of European Convention with the Concept of Mexican Treaty*

As early as 1977, Americans began to pressure the United States Government to adopt a treaty with Turkey similar to the treaties with Mexico and Canada.[38] Public awareness of the problems faced by United States citizens incarcerated overseas, heightened by literary and cinematic treatment of the subject, induced Congress to take action.[39]

Although the procedure for transfer in the Turkish Treaty is similar to that in the Mexican Treaty, the Turkish Treaty differs from the Mexican Treaty in three principal respects attributable to Turkey's desire to base the treaty on the European Convention.[40] Initially, the treaty provides exclusive grounds on which a state may refuse a prisoner transfer.[41] This provision reduces the possibility of a due process attack by a prisoner who claims that United States involvement with the foreign sentence has reached such a level that our due process standards should apply. In the event that foreign trial procedures are grossly inadequate, the United States will simply invoke this provision and refuse to enforce the judgment. Note, however, that this decision would strand the hapless prisoner in a foreign prison, which was the problem to be remedied by the Turkish Treaty.

Provisions for seizure and disposition of confiscated property are another difference flowing from the European Convention. These provisions are a requisite part of the Treaty because Turkish civil-law penal judgments often include confiscation of property in addition to deprivation of liberty. During negotiations, when the

38. *Senate Foreign Relations Hearings, supra* note 14, at 84 (Department of State response to a question for the record).

39. *Ratification Hearings, supra* note 6, at 2. In his opening statement, Senator Church remarked,

> This country's public awareness of the problems faced by Americans imprisoned overseas was heightened by the recent movie "Midnight Express." Certainly, no one on this Committee would condone the violation of a foreign country's narcotics laws. But, we all recognize the disparity between countries in prison facilities and handling of prisoners.

Id.

Similar to the earlier Mexican Treaty, the Turkish Treaty is intended to serve a threefold purpose: relieve the special hardships of prisoners incarcerated overseas; enhance the possibility of rehabilitation; and relieve the strain on diplomatic and law enforcement relations caused by imprisonment of each country's nationals in the prisons of the other. Turkish Treaty, *supra* note 1, at V, Letter of Submittal, Message From the Secretary of State to the President of the United States.

40. Turkish Treaty, *supra* note 1, at V, Letter of Submittal, Message from the Secretary of State to the President of the United States. The most notable difference emanating from molding the Turkish Treaty to the European Convention is the number of provisions required to achieve the same result as the previous treaties. The Mexican Treaty is comprised of ten articles, and the Canadian Treaty has eight. The Turkish Treaty, however, has twenty-nine articles.

41. Turkish Treaty, *supra* note 1, art. V.

Turks were informed that United States penal judgments do not generally include seizure of property, they agreed that the obligation of the requested state to enforce the seizures would be limited by that state's laws.[42] Thus, if Turkey requests the United States to provisionally seize property, the United States may comply on the condition that its own law provides for seizure in similar cases.[43]

Finally, the Turkish Treaty establishes an unprecedented mechanism for formal recognition of another country's penal judgment.[44] Previously, foreign penal judgments were implicitly recognized by the United States Attorney General's action in accepting transfer of a United States citizen from a foreign country and confining him in a United States prison on the basis of his foreign conviction.[45] Under the Turkish Treaty, the Attorney General is designated the authority competent to explicitly recognize a foreign judgment and is given specific formal steps for affirming the validity of the judgment.[46] Although the Turkish Treaty differs from the Mexican Treaty in these three respects, in operation it will function quite similarly.[47]

III. The Turkish Treaty in Operation

A. The Turkish Legal System

To comprehend the context in which the treaty will operate, it is helpful to have a basic understanding of the legal effect of treaties in Turkey and of the Turkish Code of Criminal Procedure.[48]

1. Legal Status of Treaties in Turkey.—In the Turkish hierarchy of laws, international treaties stand in essentially the same category as statutory law and are surpassed only by the Constitution.[49] Like a statute, a treaty becomes enforceable only when approved by the Turkish Grand National Assembly[50] and promulgated in the *Of-*

42. *Id.* at VII, Letter of Submittal, Message From the Secretary of State to the President of the United States.

43. *Id.* art. XXI.

44. *Id.* art. XXIV.

45. *Id.* at VIII, Letter of Submittal, Message From the Secretary of State to the President of the United States.

46. *Id.* art. XXIV(2).

47. *See* notes 63, 69-72, and accompanying text *infra.*

48. The Turkish Code of Criminal Procedure of April 20, 1929, (Law No. 1412) is a translation of the German Code of Criminal Procedure of 1877. It has been amended significantly by the Laws of June 17, 1936, June 7, 1937, June 28, 1938, January 30, 1942, and March 5, 1973, but is still in force today. *See* Golcüklu, *Criminal Procedure,* in INTRODUCTION TO TURKISH LAW 210 (T. Ansay & D. Wallace eds. 1978) [hereinafter cited as *Criminal Procedure*].

The Turkish Criminal Code is applicable to United States citizens tried for Turkish offenses because of the principle of territoriality. This means that "whoever commits a crime in Turkey shall be punished in accordance with Turkish law." *Id.* at 176.

49. *See* Güriz, *Sources of Turkish Law,* in INTRODUCTION TO TURKISH LAW 6-9 (T. Ansay & D. Wallace eds. 1978) [hereinafter cited as *Sources of Turkish Law*].

50. Article 65 of Turkey's Anayasa (Constitution) provides as follows:

ficial Gazette by the President.[51] Unlike statutes, however, the constitutionality of treaties may not be challenged. Accordingly, other parties to a treaty may rely on its validity once it is enacted.[52]

2. The Code of Criminal Procedure.—Turkish criminal trial procedure is codified and follows a mixture of the inquisitorial system, wherein the judge conducts the investigation, and the accusatorial system, wherein a public prosecutor investigates. The prosecutor typically brings the matter before the court and is required to prove the case. The judge, however, may initiate his own investigation to determine facts.[53] The proceeding progresses through successive stages of preparatory investigation, preliminary investigation, and final trial. The first two investigatory stages are based on a written report and are conducted ex parte. The trial stage occurs in open court, and the accused is allowed to confront the prosecution and witnesses.[54] The trial itself is protracted and may continue for three years since only certain questions are addressed at each hearing.[55] Turkish law requires that the accused be present for at least one hearing; then, if the court grants trial in absentia and the defendant is allowed to post bail, the trial may be conducted in absentia.[56]

> The ratification of treaties negotiated with foreign States and international organizations in behalf of the Turkish Republic is dependent upon its approval by the Turkish Grand National Assembly through the enactment of a law.
>
> . . . .
>
> International treaties duly put into effect carry the force of law.

ANAYASA (Constitution) art. 65 (Turkey).

51. *Id.* art. 93. The Official Gazette (Resmi Gazette) is published in Ankara daily, except holidays. It includes not only statutes, but also regulations, by-laws, decrees, and official announcements. *Sources of Turkish Law, supra* note 49, at 14 n.23.

52. *Sources of Turkish Law, supra* note 49, at 7.

53. *Criminal Procedure, supra* note 48, at 209.

The procedure is similar to Mexico's two step proceeding that is comprised of the *sumario* and *plenario.* During the *sumario* evidence is collected by interview and investigation by the court itself. After the judge determines he has sufficient evidence to establish a prima facie case, the parties are permitted to make any final additions to the record. The *sumario* is then closed, and the *plenario,* a public hearing, is held. The case is then concluded and the judge makes a finding of guilt or innocence. Chattin Case (United States v. Mexico), 1927 Opinions of Commissioners 422, 4 R. Int'l Arb. Awards 282. The Chattin Case is cited in H. STEINER & D. VAGTS, TRANSNATIONAL LEGAL PROBLEMS 367, 371-72 (2d ed. 1976). For a compilation of materials on civil law proceedings, see Snee & Pye, *Due Process in Criminal Procedure: A Comparison of Two Systems,* 21 OHIO ST. L.J. 467, 471 n.18 (1960). For discussion of the Chattin Case vis-à-vis Mexican trial proceedings, see Comment, *Execution of Foreign Sentences in the United States: A Treaty With Mexico,* 9 ST. MARY'S L.J. 118, 122-25 (1977).

54. *Criminal Procedure, supra* note 48, at 209-10.

55. Telephone interview with Lieutenant Colonel James Miles, USAF, Member of Turkish Treaty Negotiating Team, in Washington, D.C. (Jan. 16, 1980). Lieutenant Colonel Miles' statement was based on first-hand experience as defense counsel in Turkish courts.

56. THE TURKISH CODE OF CRIMINAL PROCEDURE, *reprinted in* 5 THE AMERICAN SERIES OF FOREIGN PENAL CODES (1962) [hereinafter cited as TURKISH CODE]. "If punishment for a crime consists of light imprisonment, confiscation or a fine, or a combination of these, the trial may proceed without the presence of the accused." *Id.* § 225. "Except for crimes carrying heavy punishment, the accused may, upon his own request, be excused from attending the trial." *Id.* § 226.

These provisions benefit American servicemen charged with offenses in Turkey. After a serviceman is granted trial in absentia and posts bail, he can rotate from the country. Unless

A defendant may appeal the judgment or decisions rendered prior to judgment[57] only on the basis that the judgment is contrary to law, which includes erroneous application of a procedural rule.[58] Upon reversal by the Court of Appeals (Supreme Court), a judgment is remanded to the original court or to a different court of the same type jurisdiction for a new trial.[59]

B. Mechanism for Transfer Under the Treaty

The Treaty will allow citizens of either party who have been convicted in the courts of the other party to serve their prison sentences in their own country. This is accomplished through a process of formally recognizing the foreign penal judgment, effecting the transfer of the prisoner, and then enforcing the judgment.[60]

In the Turkish Treaty, the terms "sentencing state" and "requesting state"[61] refer to the country that convicted the offender and that is requesting the other state to enforce its criminal judgment.

American military authorities assure the Turkish court of the soldier's return, the court does not expect to see the accused again. Since foreign sentence can only be enforced against the defendant if he returns, the trial has little effect. *See, e.g.,* T. SNEE & H. PYE, STATUS OF FORCES AGREEMENTS: CRIMINAL JURISDICTION 141-43 (1957). The possible disadvantages to the serviceman of a conviction in absentia include prejudice to his future career in the United States and risk of administrative discharge. *Id.* at 143.

After the Turkish Treaty becomes effective, this procedural advantage may not be available. If a serviceman is convicted and sentenced by a Turkish court after he has left the country, Turkish competent authority may request the United States to recognize and enforce the penal judgment. 48 U.S.C.A. § 955(b) (West Supp. 1979). The Treaty specifically provides that when the sentenced person "is actually in the territory of the requested state at the time of the request [the penal judgment] shall be enforced in that state under the provisions of this Treaty." Turkish Treaty, *supra* note 1, art. XXIV(3). Although the offender's consent is required before a penal sanction may be enforced, under the new extradition treaty with Turkey, *supra* note 2, the offender could simply be returned to Turkey. Therefore, he would probably consent to serve his sentence in the United States.

Although servicemen in Turkey appear to have suffered a setback as a result of the Treaty, in actuality they will enjoy the most sophisticated method of ensuring just treatment of prisoners yet devised. Members of the force assigned in Turkey who have been accused of an offense against Turkey enjoy the benefit of the seven procedural safeguards required by the SOFA and the prospect of pretrial confinement in American facilities. *See* note 9 *supra.* In addition, when the Turkish Treaty goes into effect, they will be able to serve the foreign penal judgment in the United States. It is, in effect, a closed loop of protection that no other class of persons in the world enjoys while in a foreign land.

57. TURKISH CODE, *supra* note 56, art. 306.

58. *Id.* art. 307.

59. *Id.* arts. 321, 322. A defendant may also file an appeal in absentia through counsel or a representative. *Id.* arts. 269, 273, 275.

60. The Turkish government will follow a slightly different procedure known as "exequator" using article 23 of the Treaty when transferring a Turkish prisoner from the United States to Turkey. Under this procedure, the United States judgment is recognized and the Turkish courts are bound by the United States finding of fact under article 25. The United States sentence is not binding, however, and a Turkish judge may pronounce a new sentence when the prisoner returns to Turkey. See Turkish Treaty, *supra* note 1, at VIII, Letter of Submittal, Message of the Secretary of State, to the President of the United States.

61. *Id.* at art. I(a). The treaty defines "requesting state" or "sentencing state" as "the [p]arty which requests the recognition of the validity and enforcement of a penal judgment . . . ." *Id.*

The term "requested state"[62] refers to the nation that is being asked to enforce the first nation's penal judgment. Thus, for example, an American offender would transfer from the requesting state, Turkey, to serve his sentence in the requested state, the United States.

1. Formal Recognition of Foreign Judgment.—A prisoner is eligible to transfer if he has been convicted of an offense proscribed by the laws of both countries, has at least six months to serve on his sentence, is not a domiciliary of the country in which he is incarcerated, and consents to the transfer.[63] If these conditions are satisfied, competent authority of the requesting state will initiate the request[64]

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62. *Id.* art. I(b). " 'Requested state' means the party which is asked to recognize the validity of and to enforce a penal judgment."

63. *Id.* art. IV. Voluntariness of the offender's consent to transfer was considered so significant that extensive precautions to verify the voluntariness were included in the implementing legislation:

> The verification proceedings require that the offender personally appear before the verifying officer in the country in which the sentence was imposed.
>
> The verifying officer may be a United States magistrate, a judge of the United States as defined in section 451 of title 28, United States Code, or a citizen specifically designated by a judge of the United States as defined in section 451 of title 28, United States Code.
>
> The verifying officer must personally inform the offender of the conditions under which the transfer may be made and determine that the offender understands them and agrees to them. If necessary, an interpreter will be utilized. The right of the offender to consult counsel and to have counsel appointed must be explained to him by the verifying officer. The verifying officer is directed to make the necessary inquiries to determine that the offender's consent is voluntary and not the result of any promises, threats, or other improper inducements. Such inquiries may be directed not only to the offender but to any other person. The verifying officer may also consider any document or physical evidence which will assist him in making his determination.
>
> The entire proceedings must be recorded either by a reporter or by suitable sound recording equipment.
>
> To provide readily available evidence of the validity of the consent, a form to be utilized at the proceeding will be prepared. The content of the form and instruction for its use will be specified in the regulations.

H.R. REP. NO. 720, 95th Cong., 1st Sess. 37-38 (1977), *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 3146, 3160.

Since the Turkish government was adverse to allowing United States Magistrates to act in a judicial capacity within Turkish borders, the verifying officer under the Turkish Treaty will be "a citizen specifically designated by a judge of the United States." *Id.* In practice, United States Consuls will be appointed by the District of Columbia District Court to serve as verifying officers. Telephone interview with Michael Abbell, Director, Office of International Affairs, Criminal Division, Department of Justice, in Washington, D.C. (May 8, 1980).

In addition, the foreign prisoner will be given a prepared question and answer booklet that contains answers to several questions about the treaty and its operation, the operation of United States parole laws, and regulations of the United States Federal Prison system. *See* note 115 *infra.*

64. This provision is similar to that in the Mexican Treaty wherein transfers are initiated by the penal authority of the transferring (sentencing) state. Mexican Treaty, *supra* note 7, at art. IV (1)(2). Under the Turkish Treaty a convicted offender may, however, ask the requesting state to initiate the request for recognition of his judgment. Turkish Treaty, *supra* note 1, at art. XII(2).

In actual practice, the procedure in Turkey will probably evolve similar to that in Mexico. A prisoner in Mexico now initiates the transfer himself. This procedure was discussed during the Ratification Hearing:

> Mr. Abbell: Under the treaty, . . . the Mexican Government would initiate the transfer of an American back to the United States. However, in practice, it has evolved that our consular officers in Mexico, in cooperation with the Mexican Attor-

for recognition and enforcement of its penal judgment.[65] The requested state may then either accept or reject the request on the basis of ten enumerated grounds.[66] After accepting the request to recognize a foreign judgment, the requested state will formally recognize the validity of that judgment.

2. Effecting the Transfer.—Following this formal recognition of the penal judgment and determination by competent authority that all conditions of the treaty have been met, the actual transfer is arranged. The date and place for delivery of custody is determined by mutual agreement of the parties.[67] Before the actual transfer occurs, a final confirmation of the offender's continued consent to transfer is made[68] Following this, the prisoner is returned.

3. Enforcement of a Foreign Sentence.—Enforcement of the judgment begins once a prisoner has arrived in his home country.[69] At this point, the two countries share adjudicative authority over the offender. The sentencing state has the exclusive right to decide "any application for review of a sentence, all appeals or any other proceedings seeking to . . . invalidate conviction or sentences rendered

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ney General's office and the Mexican equivalent of the Bureau of Prisons, [have] worked out a system whereby the applications are made by the American prisoner to the Mexican prison authorities and then forwarded through our diplomatic [pouches] inside Mexico to the Embassy in Mexico City for presentation to the Mexican Government.

The Chairman. So, in reality, it is the prisoner himself who initiates it.

Mr. Abbell. Yes.

Ratification Hearings, supra note 6, at 28. (Statements of Michael Abbell, Director, Office of International Affairs, Criminal Division, Department of Justice, and Senator Frank Church, Chairman of the Senate Foreign Relations Committee).

65. Turkish Treaty, *supra* note 1, at art. XII(1). Recognition of foreign judgments is allowed under the doctrine of comity. As defined in the leading case, Hilton v. Guyot, 159 U.S. 113 (1895), comity is

> the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.

Id. at 164. For further discussion, see Note, *"Justice with Mercy": The Treaties with Canada and Mexico for the Execution of Penal Judgments,* 4 BROOKLYN J. OF INT'L L. 246, 254 (1978).

66. Turkish Treaty, *supra* note 1, at art. V(a)-(j). Before accepting enforcement of the sanction, the requested state must specify in a decision by the competent authority that several requirements have been satisfied. The requested sanction must have been imposed in a final criminal judgment. *Id.* art. XXIII(a). The act for which the offender has been convicted must be a crime under the laws of both countries. *Id.* art. III. The six conditions of article IV must be met. *Id.* art. XXIII(b). The enforcement must not run counter to the fundamental legal principles of the requested state. *Id.* art. XXIII(c). The offender may not have been previously acquitted or granted amnesty for the offense, nor may enforcement be barred by a statute of limitations. *Id.* art. XXIII(d). When the requested state determines that each of these enumerated conditions and others specified in the treaty have been fulfilled, it must promptly inform the authorities of the requesting state that it accepts enforcement of the penal judgment. *Id.* art. XVII(1).

67. *Id.* art. XXVII.

68. *Id.*

69. American prisoners who return from Turkey will become federal prisoners under the implementing legislation. *Ratification Hearings, supra* note 6, at 22.

by one of its courts."[70] In addition, the sentencing state retains exclusive power to pardon or grant amnesty.[71] Enforcement of the sanction, however, is governed by the law of the requested state.[72] Thus, in America, the United States Parole Commission has jurisdiction over prisoners returned under the Treaty[73] and is authorized to apply the parole laws of the United States to transferred offenders.[74]

In computing the duration of the transferee's term of imprisonment in the United States, the Parole Commission must take as its basis the length of the sentence imposed by the Turkish court. The Commission may then consider several other criteria, including the sanction prescribed by American law for the same offense, to arrive at a just sentence.[75] Furthermore, all time served in a foreign prison because of the foreign offense is credited toward the corresponding American sentence.[76] Thus, in most respects, the transferred offender is treated like an individual who had been sentenced in the United States for the same offense.[77]

IV. Challenges to the Treaty by American Prisoners

The majority of criticism of the Turkish Treaty by American prisoners will arise in the context of a habeas corpus challenge to continued imprisonment in a federal penitentiary. Two provisions of the treaty are, therefore, likely to face attack: (1) Article IX,

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70. Turkish Treaty, *supra* note 1, at art. IX(1).

71. *Id.* art. IX(2).

72. *Id.* art. XXVI(1).

73. 18 U.S.C.A. § 4106(a) (West Supp. 1979).

74. *Id.* § 4106(b). In section-by-section analysis, the committee emphasized that

> the parole determination criteria set forth in 18 U.S.C. 4206 (and made specifically applicable to transferred offenders by the instant legislation) shall be uniformly applied. In other words, the committee expects the U.S. Parole Commission to apply the same standards and criteria to transferred offenders as are applied to U.S. offenders.

H.R. REP. NO. 720, 95th Cong., 1st Sess. 36 (1977), *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 3146, 3159.

75. Turkish Treaty, *supra* note 1, at art. XXVI(2). According to the Treaty, four factors that may be taken into consideration in enforcing the foreign sanction include,

> (a) The sanction prescribed by its own law for the same offense,
>
> (b) The minimum duration prescribed by the law of the requesting state for the offense,
>
> (c) Facts and legal causes specified in the judgment as mitigating or aggravating circumstances and any additional information accompanying the request. Nevertheless, the requested state may not convert a sanction involving deprivation of liberty into a fine,
>
> (d) Any other facts and circumstances, particularly those occurring subsequent to conviction which may have a bearing on the manner in which the sentences should be executed.

Id.

76. 18 U.S.C.A. § 4105(b) (West Supp. 1979).

77. Collateral effects of the foreign conviction with which the defendant must still contend exist, however, including state double jeopardy, foreign conviction recognition by state multiple offender statutes, and impeachment of a witness in an American trial by establishing a previous foreign conviction. *See generally* Pye, *The Effect of Foreign Criminal Judgments in the United States*, 32 U. MO. KAN. CITY L. REV. 114, 120-36 (1964).

which grants the sentencing state the exclusive right to decide all challenges to the sentence; and (2) Article IV, which requires a prisoner's consent to transfer before his penal judgment may be enforced. In this context, the question arises: what avenues of appellate review are available to the offender after he has consented to transfer?

Article IX specifically prevents the prisoner's use of a United States court to attack the sentence or conviction rendered by the foreign court.[78] This does not preclude a challenge in a United States court, however, that is not based on the foreign conviction or sentence.[79] Therefore, in a petition for a writ of habeas corpus, the transferred prisoner may challenge the procedure utilized in his transfer as not satisfying the statutory requirements and may challenge the constitutionality of the treaty or its implementing legislation.[80] The returning offender may also claim lack of due process in the foreign court. In other words, the treaty faces attack on grounds that it is unconstitutional as applied, that it fails to guarantee due process, and that it is unconstitutional on its face.

A. Transfer Provisions Were Illegally Applied

Once an American prisoner has transferred from Turkey he may contend that his transfer did not satisfy the terms of the treaty because he was transferred without his voluntary consent. The contention would be based on the argument that the conditions of incarceration in Turkey vitiated any voluntariness in the decision to transfer. The prisoner would further argue that having been subjected to duress, his consent was involuntary.[81] Therefore, he is wrongly detained in federal prison since his transfer did not comply with the consent provision of the treaty, and he is entitled to a writ of habeas corpus.

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78. Turkish Treaty, *supra* note 1, at art. IX(1). The article provides, "The sentencing state alone shall have the right to decide on any applications for review of a sentence, all appeals, or any other proceedings seeking to challenge, modify, set aside, or otherwise invalidate a conviction or sentences [*sic*] rendered by one of its courts." *Id.*

79. 18 U.S.C.A. § 3244(5) (West Supp. 1979). *See* H.R. REP. No. 720, 95th Cong., 1st Sess. 43 (1977) *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 3146, 3165-66; *Senate Foreign Relations Hearings, supra* note 14, at 84.

80. During the ratification hearings on the Turkish Treaty, the committee acknowledged that a transferred offender could raise this contention. They believed, however, that the legislative history of the treaties and the implementing legislation showed Senate concern for the quality of the foreign proceedings, rendering the contention groundless. The decisions to date have substantiated this analysis.

> There have been six decisions, too, [*sic*] on Canadian cases, and four on Mexican cases . . . in which [the courts] held the due process question was not one they would consider, because . . . the United States, in entering the treaty, had considered the legal procedures of those countries and found them sufficient, even though not precisely the same as ours.

Ratification Hearings, supra note 6, at 17.

81. *See* notes 86-89, 96, 97 and accompanying text *infra.*

Currently, two district court decisions have confronted this contention emanating from essentially the same factual situations and have reached opposite conclusions.[82] Both cases concerned the Mexican Treaty, the terms of which are essentially identical to the Turkish Treaty. In addition, both Mexico and Turkey are civil-law countries with comparable trial procedures.[83] Thus, the cases present a background for discussion of possible challenges to the treaty.

In *Velez v. Nelson,*[84] three Americans transferred from Mexico after consenting to return to the United States. In recorded proceedings before a United States magistrate, they swore under oath that they had not been coerced into volunteering to transfer.[85] Upon re-

82. Velez v. Nelson, 475 F. Supp. 865 (D. Conn. 1979), *rev'd sub nom.,* Rosado v. Civiletti, Nos. 80-2001/3 (2d Cir. April 23, 1980), *petition for cert. filed,* 48 U.S.L.W. __ (U.S. June 3, 1980) (No. 79-6690); Pfeifer v. United States Bureau of Prisons, 468 F. Supp. 920 (S.D. Cal. 1979), *aff'd,* 615 F.2d 873 (9th Cir. 1980), *cert denied,* 48 U.S.L.W. __ (U.S. June 9, 1980) (No. 79-6400). These two cases articulate the various criticisms of the prisoner transfer treaties. Since, at this point, *Velez* awaits final disposition in the Supreme Court, and since it could have a profound impact on the Turkish Treaty, it will be analyzed in depth.

Another district court decision, Mitchell v. United States, 483 F. Supp. 291 (E.D. Wis. 1980), followed the rationale of *Pfeifer* and denied a writ of habeas corpus to a transferred prisoner.

In addition, several petitions for habeas corpus have been dismissed by other district courts: Williams v. Ralston, No. 79-3166 (W.D. Mo., petition dismissed Mar. 21, 1980); Kanasola v. Bell, No. 78-177 (E.D. Ky., petition denied Jan. 28, 1980, notice of appeal filed Mar. 11, 1980); Cabello Villereal v. Keohne, No. 79-1003-D (W.D. Okla., petition denied Dec. 31, 1979); Orozco v. United States Bureau of Prisons, No. CV 78-2485 (C.D. Cal. Oct. 24, 1979); Licata v. Fento, No. 79-807 (M.D. Pa., petition denied Oct. 30, 1979, notice of appeal filed Nov. 6, 1979); Isbell v. United States Bureau of Prisons, No. CV 78-2400 (C.D. Cal., petition denied July 31, 1979); Ruiz v. Bell, No. 79-16 (M.D. Pa., petition dismissed June 29, 1979).

83. *See* note 53 *supra,* for a discussion of the countries' comparable trial procedures.

84. 475 F. Supp. 865 (D. Conn. 1979).

85. The form signed by petitioners contained the following statements:

> I, ____ having been duly sworn by a verifying officer appointed under the laws of the United States of America, certify that I understand and agree, in consenting to transfer to the United States of America for the execution of the penal sentence imposed on me by a court of the United Mexican States, or of a state thereof, that:
> 1) My conviction or sentence can only be modified or set aside through appropriate proceedings brought by me or on my behalf in the United Mexican States;
> (2) My sentence will be carried out according to the laws of the United States of America and that those laws are subject to change;
> (3) If a court of the United States of America should determine upon a proceeding brought by me or on my behalf that my transfer was not accomplished in accordance with the treaty or laws of the United States of America, I may be returned to the United Mexican States for the purpose of completing my sentence if the United Mexican States requests my return; and,
> (4) Once my consent to transfer is verified by the verifying officer, I may not revoke that consent.
> I further certify that:
> (1) I have been advised of my right to consult with counsel, and have been afforded the opportunity for such consultation prior to giving my consent to transfer;
> (2) I have been advised that if I am financially unable to obtain counsel, one would be appointed for me by the verifying officer free of charge; and,
> (3) *My consent to transfer is wholly voluntary and not the result of any promises, threats, coercion, or other improper inducements.*

Form for Verification of Consent to Transfer to the United States of America for Execution of Penal Sentence of United Mexican States. (Form DOJ-1978-04, available from United States Department of Justice, Office of International Affairs) (emphasis added) [hereinafter cited as Consent Verification Form].

turn, they brought an action alleging that their consent was coerced and not truly voluntary. In support of this allegation, petitioners presented uncontroverted testimony on the conditions of their Mexican incarceration. After being arrested without a warrant in Mexico, they were detained, searched, and interrogated in connection with a narcotics smuggling operation.[86] For eight days they were subjected to sustained physical torture in an effort to force them to sign "confessions."[87] None would sign the confession, and they were, subsequently, sent to Lecumberri Prison. At Lecumberri they were beaten and forced to pay large sums of money for food, clothing, and cell space.[88] Eight months later they were informed that they had been convicted of conspiring to import cocaine and had been sentenced to nine years in prison. During their confinement, Mexican prison authorities and certain powerful inmates demanded payment in return for necessities, and petitioners lived in constant fear of bodily harm.[89] They had been in prison nearly two years when they learned of the prisoner transfer treaty from a United States Government representative. Following proceedings before a magistrate, petitioners were returned to United States custody on December 10, 1977, after twenty-five months of confinement.[90]

The United States District Court for the District of Connecticut reasoned that the consent required by the treaty must comport with constitutional standards of voluntariness since the offender is deemed to have waived certain constitutional rights as a consequence of electing to transfer. The court relied on *Schneckloth v. Bustamonte*[91] to assert that the constitutional standard of voluntariness is a question of fact to be determined from *all* surrounding circumstances including length of detention, prolonged nature of questioning, and occurrence of physical punishment.[92] Applying these principles to the circumstances that precipitated petitioners' consent to transfer, the court found under the unique facts of this case that the consents were not truly voluntary and were, therefore, invalid. Consequently, the United States lacked lawful custody over the transferred offenders under the terms of the Treaty, and the writs of habeas corpus were granted.[93]

Under almost identical facts, the district court for the Southern

86. 475 F. Supp. at 867.
87. *Id.* at 869.
88. *Id.* at 869-70.
89. *Id.* at 873-74.
90. *Id.* at 872.
91. 412 U.S. 218 (1973).
92. 475 F. Supp. at 873.
93. *Id.* at 874. Since the petitioners had already been released from federal prison on parole when the ruling was issued, the effect was to remove them from parole altogether. *Ratification Hearings, supra* note 6, at 15.

District of California reached the opposite conclusion and refused to grant a writ of habeas corpus. In *Pfeifer v. United States Bureau of Prisons,*[94] petitioner brought habeas corpus proceedings[95] seeking release from a federal penitentiary in which be was serving the remainder of a sentence originally imposed by a Mexican court for importation of cocaine. Petitioner had been arrested at the Mexico City airport in September 1977 after Mexican officials searched his bags and found a can of powder alleged to be cocaine. He claimed that he was subsequently beaten by five Mexican agents, tortured with cattle prods, and forced to sign a confession that he was not allowed to read.[96] Without further hearings, he was held in prison for six months and was subjected to deprivations and inhumane treatment. On March 31, 1978, a Mexican court found him guilty and sentenced him to seven years for importation of cocaine.[97] Twelve days later, pursuant to the procedures outlined in the implementing legislation, a hearing was held before a United States magistrate in Mexico. At the conclusion of the hearing, petitioner signed the Consent Verification Form.[98] In May 1978 the petitioner was transferred to the Metropolitan Correctional Center in San Diego from which he filed a petition for a writ of habeas corpus.[99]

The two cases are factually indistinguishable. Both concerned arrests in Mexico on charges of importation of cocaine and included uncontroverted evidence of beatings and torture in efforts to produce confessions. In both cases petitioners had been incarcerated for a prolonged period without due process rights under allegedly inhumane conditions.

In addressing the claim that petitioner did not voluntarily consent because he was under "duress," the *Pfeifer* court found that the record did not support petitioner's allegations.[100] The district court reasoned that the statutorally mandated consent verification procedure was followed[101] and "[n]othing in the record shows that the magistrate's finding of a voluntary consent was clearly erroneous or

94. 468 F. Supp. 920 (S.D. Cal. 1979), *aff'd,* 615 F.2d 873 (9th Cir. 1980), *cert. denied,* 48 U.S.L.W. __ (U.S. June 9, 1980) (No. 79-6400).

95. 28 U.S.C. § 2241 (1976).

96. 468 F. Supp. at 922.

97. Petitioner also received a five year sentence for possession of counterfeit money, which was to run consecutively to the seven year sentence. *Id.*

98. *See* note 85, *supra.*

99. 468 F. Supp. at 922. At the court of appeals, Pfeiffer also alleged that he was denied effective assistance of counsel and the right to appeal. These arguments were also rejected by the court. 615 F.2d at 876.

100. 468 F. Supp. at 922. The district court finding was upheld by the Ninth Circuit. 615 F.2d at 877.

101. At his hearing, Pfeifer signed the consent verification form, and the magistrate attested to the voluntariness of the consent both orally and in writing. The magistrate made all the inquiries required of him under 18 U.S.C.A. § 4108 (West Supp. 1979). 468 F. Supp. at 922.

an abuse of discretion."[102] In response to Pfeifer's specific contention that his consent was involuntary because he acted under "the duress factor of having to stay in Mexico and be resubjected to deprivation and inhumane treatment," the court noted that the threat of having to stay in Mexico was simply petitioner's alternative to returning to the United States; it was not the sort of "duress" that invalidates consent. "Were Pfeifer's test for duress accepted, no prisoner could consent to transfer"[103] because every prisoner eligible to transfer under the treaties faces precisely the same choice. Moreover, petitioner stated under oath at the hearing that no one had threatened or coerced him to sign the form.[104] Utilizing this rationale, the court found that petitioner's consent to transfer was voluntarily given and that the transfer complied with the terms of the treaty and its implementing legislation. Accordingly, the petition for habeas corpus was denied.[105]

Of the two decisions, *Pfeifer* appears the better reasoned. The *Velez* court's reliance on *Schneckloth v. Bustamonte*[106] for the proposition that "the determination of petitioners' consents is a question of fact to be determined from all the surrounding circumstances"[107] is ill-founded. *Schneckloth* concerned a search and seizure issue, and, in dicta, the Supreme Court addressed the voluntariness of a *confession.*[108] The *Velez* court, relying on this dicta, applied the "totality of the circumstances" test for voluntariness of a confession to the transfer situation.

The Government appealed the district court's decision and the Second Circuit correctly rejected the *Schneckloth* test, applying instead the test evolved from cases construing the voluntariness of guilty pleas.[109] As enunciated in *North Carolina v. Alford,*[110] the vol-

102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.* at 927.
106. 412 U.S. 218 (1973).
107. 475 F. Supp. at 873.
108. In its discussion of confessions, the court reasoned, "[I]n determining whether a defendant's will was overborne in a particular case, the Court has assessed the totality of all the surrounding circumstances — both the characteristics of the accused and the details of interrogation." 412 U.S. at 226. The Court then enumerated some of the factors taken into account to determine if defendant's will actually was overborne, including those listed by the *Velez* court: length of detention, prolonged nature of questioning, and the occurrence of physical punishment. Limiting its analysis to the circumstances surrounding a confession, the Court concluded, "[I]n all of these cases, the Court determined the factual circumstances surrounding the *confession,* assessed the psychological impact on the accused and evaluated the legal significance of how the accused reacted." *Id.* (emphasis added). In addition, the actual holding in *Schneckloth* is confined to the area of consent searches:

> We hold only that when the subject of a search is not in custody and the State attempts to justify a search on the basis of his consent, the Fourth and Fourteenth Amendments require that it demonstrate that the consent was in fact voluntarily given, and not the result of duress or coercion, express or implied.

Id. at 248.
109. Chief Judge Kaufman, writing for the court, reasoned that a standard of voluntari-

untariness of a guilty plea is determined by whether the defendant's decision reflected a deliberate, intelligent choice between available alternatives.[111] Since, in the case at bar, petitioners chose between the alternatives of continued incarceration under brutal conditions in a Mexican prison and transfer to American custody with the advantage of American laws governing parole, "it cannot be seriously doubted that their decisions were voluntarily and intelligently made."[112] Thus, under a test for voluntariness that more closely approximates the transfer situation, the contention that the voluntariness of a prisoner's consent to transfer is nullified by previous mistreatment would fail.

Even if the totality of the circumstances test is accepted, however, the test was misapplied by the *Velez* court. The circumstances surrounding the consent proceeding per se show that defendant's will was not overborne. Considering the brevity of the proceedings, the absence of prolonged questioning, and no evidence of physical punishment of the offender by Mexican or United States officials to force him to sign the consent form, the court should have found no basis for the contention of involuntary consent. Petitioners' previous mistreatment in Mexican prisons did not, therefore, destroy the voluntariness of their consent to transfer under the totality of circumstances test.

Furthermore, the legislative history of the Mexican Treaty shows that Congress was well aware of the conditions in Mexican prisons, including the prison in which Velez was incarcerated, when it ratified the treaty and passed the implementing legislation.[113] This mistreatment was precisely the reason that the treaty was executed.[114] Thus, for a petitioner to contend that the prison conditions coerced him into involuntarily consenting to transfer is illogical and

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ness designed to govern consensual searches and seizures within the United States was inapplicable to transfer situations.

> Though we can find no case presenting facts on point to guide us in these extraordinary circumstances, it is readily apparent that a decision whether to permit a police officer to search one's car does not remotely resemble the choice presented to these petitioners under the Treaty. In our view the choice that faces an American imprisoned in Mexico in deciding whether to transfer more closely resembles a decision confronted by nearly every criminal defendant today: whether to plead guilty and accept a set of specified sanctions ranging from probation to a possibly long prison sentence, or to stand trial and face unknown dispositions ranging from possible acquittal to a severe maximum sentence or even death. In the plea bargaining context, as in the case at bar, the choice involves liberty and incarceration on both sides of the equation.

Rosado v. Civiletti, Nos. 80-2001/3, slip op. at 2546 (2d Cir. April 23, 1980).

110. 400 U.S. 25 (1970).
111. *Id.* at 37-38.
112. Rosado v. Civiletti, Nos. 80-2001/3, slip op. at 2548 (2d Cir. April 23, 1980).
113. *See* notes 5 and 19 *supra*.
114. *See* notes 22-24 and accompanying text *supra* (rationale and purpose of the treaty).

unrealistic.[115] It directly contradicts the fact that fully twenty percent of the Americans imprisoned in Mexico decided to stay when initially given the opportunity to transfer.[116] Additionally, if brutal prison conditions were permitted to determine the voluntariness of a prisoner's consent to transfer, those now incarcerated who desperately need to transfer would never be able to satisfy the magistrate that their consents were voluntary.[117]

Moreover, Congress was aware that problems of proof would arise concerning the voluntariness of the consent and, therefore, provided an elaborate procedure to guarantee that the prisoner's decision was uncoerced.[118] Permitting the transferred offender to contend that circumstances outside the proceeding coerced his decision controverts the clear legislative intent behind the consent verification proceeding. This aspect of the *Velez* holding would have put later transferees on notice that once safely inside the United States they could successfully allege the involuntariness of their consent when seeking habeas corpus relief and that the government would be powerless to disprove their allegations. The Second Circuit consequently refused to affirm *Velez.*[119]

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115. A more plausible reason for petitioners' decision to transfer is the simple prospect of improved living conditions in the United States:

> [I]ncarceration in one's own nation facilitates contact with family, friends, and legal counsel. Furthermore, rehabilitation may be enhanced within an institution in which an offender can obtain suitable vocational training and education in his or her own language and culture. Possibilities of work release and arrangements for post-release employment are greater when contact with prospective employers is possible. The possibility of discrimination against an offender because of "foreign" status would also be reduced.

Abramovsky & Eagle, *A Critical Evaluation of the Mexican-American Transfer of Penal Sanctions Treaty*, 64 IOWA L. REV. 275, 298 (1979) (footnotes omitted).

Another reason for desiring transfer is the immediate eligibility for parole. The question and answer booklet given the prisoners while still incarcerated in Mexico provided them with sufficient information to estimate the customary range of months they would serve in American prison before release on parole. For their offense, possession of hard drugs with intent to distribute on a large scale, the customary range is forty to fifty-five months. U.S. DEP'T OF JUSTICE, INFORMATION BOOKLET FOR UNITED STATES CITIZENS INCARCERATED IN MEXICAN PRISONS REGARDING THE OPERATION OF THE TREATY BETWEEN THE UNITED MEXICAN STATES AND THE UNITED STATES OF AMERICA ON THE EXECUTION OF PENAL SENTENCES 9, app. C [hereinafter cited as Information Booklet]. Thus, petitioners were most likely aware that by transferring they would be released within a short time since they had already served twenty-five months. If they remained in Mexico they would be required to serve the full seven year sentence. This time differential may well have been their prime motivation.

116. *Ratification Hearings, supra* note 6, at 29. *See also Hearings on Treaty with Bolivia on the Execution of Penal Sentences Before the Senate Comm. on Foreign Relations,* S. EXEC. REP. No. 22, 95th Cong., 2d Sess. 17 (1978) (statement of Michael Abbell, Special Ass't to the Ass't Att'y Gen. Crim. Div., U.S. Dep't of Justice and Director of Prisoner Transfer Program).

117. *See* Rosado v. Civiletti, Nos. 80-2001/3, slip op. at 2545 n.31 (2d Cir. April 23, 1980).

118. *See Senate Judiciary Hearings, supra* note 19, at 55. "To minimize the litigation problems which may arise it has been deemed desirable for the United States to verify the consent in each case and to have the verification procedure included in the implementing legislation." *Id. See also Senate Foreign Relations Hearings, supra* note 14, at 47 (statement of Hon. Herbert J. Hansell, Legal Advisor, Department of State). "[T]he problems that would be involved in holding hearings in a U.S. court to determine precisely what happened in a remote Mexican police station might well be insurmountable." *Id.*

119. Rosado v. Civiletti, Nos. 80-2001/3, slip op. at 2567-68 (2d Cir. April 23, 1980).

If sustained by the Supreme Court, *Velez* could have a devastating effect on the validity of the entire series of prisoner transfer treaties.[120] In fact, the Mexican Government delivered a diplomatic protest over the *Velez* ruling and threatened to suspend future transfers under the Treaty.[121] In reversing *Velez,* the Second Circuit wisely discerned that the interests of those Americans currently incarcerated abroad are of paramount importance and refused "to scuttle the one certain opportunity open to Americans incarcerated abroad to return home . . . ."[122]

B. Continued Imprisonment Involves United States Government in Trial Without Due Process

A second major challenge facing the Turkish Treaty is that the United States Government's taking custody of an American citizen for service of a sentence imposed in an unfair foreign trial is governmental involvement in an unconstitutional proceeding.[123] The substance of the claim is that the due process clause of the fifth amendment prohibits such imprisonment if the foreign conviction was obtained by procedures lacking the safeguards of the Bill of Rights, and, therefore, the offender should be freed by writ of habeas corpus. Accordingly, this contention raises two issues: whether the constitutional due process safeguards apply to American citizens tried outside the United States; and, if not, whether enforcement of the foreign sentence constitutes sufficient involvement in the foreign

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120. *See* Vagts, *A Reply to "A Critical Evaluation of the Mexican-American Transfer of Penal Sanctions Treaty,"* 64 IOWA L. REV. 325, 334 (1979). *See also Senate Foreign Relations Hearings, supra* note 14, at 95.

> What occurs to me is perhaps the single most important thing to focus on at this point. That is the fact . . . that if a handful of these early prisoners were to be released by the American courts, that would abort the program. In a very real sense, I gather, from the position taken by the Executive and the record made by the Executive, *the Mexicans particularly,* and the Canadians presumably, *would not continue to consent to or abide by the removal plan if the U.S. courts began to judge and review their sentencing.*

Id. (statement of Alan C. Swann, witness) (emphasis added).

121. Rosado v. Civiletti, Nos. 80-2001/3, slip op. at 2530 n.10 (2d Cir. April 23, 1980).

122. *Id.* at 2568. The court noted that as of March 23, 1980, 226 Americans were still incarcerated in Mexico. Since ratification of the Treaty, 451 Americans had transferred to United States custody. *Id.* at n.45.

The court also realized the effect of its decision on prisoner transfer treaties with other countries including Turkey. "Whatever hope the Treaty extends of escaping the harsh realities of confinement abroad will be dashed for hundreds of Americans if we permit these three petitioners to rescind their agreement to limit their attacks upon their convictions to Mexico's courts." *Id.* at 2568.

123. This argument was raised unsuccessfully by petitioner in Pfeiffer v. United States Bureau of Prisons, 468 F. Supp. 920, 922-23 (S.D. Cal. 1979). Under the Turkish Treaty, the provision in article V for refusal of a transfer when enforcement of the sentence would counter the fundamental legal principles of the state further reduces the likelihood of a successful attack on these grounds. *See* note 66 and accompanying text *supra.* Nonetheless, the contention may still be raised. *See* note 80 and accompanying text *supra.*

trial to invoke these constitutional safeguards upon return to the United States.

1. Territorial Sovereignty.—In international law exclusive territorial jurisdiction is one of the basic attributes of sovereignty. States are, therefore, prohibited from exercising jurisdiction within another sovereign's territory.[124] Thus, if a foreign citizen commits an offense in the United States, he is tried in United States courts under United States standards rather than under his nation's law. Similarly, when a United States citizen commits an offense against a foreign state he is tried in that state under its corresponding standards. In short, unless treaties provide otherwise,[125] the United States Constitution does not extend extraterritorially.

This principle was illustrated in *Neely v. Henkel*[126] in the analogous situation of extradition proceedings. In that case, a United States citizen contested extradition to a foreign country under a federal statute on grounds that the statute "does not secure to the accused, when surrendered to a foreign country for trial in its tribunals, all of the rights, privileges, and immunities that are guaranteed by the Constitution to persons charged with the commission in this country of crime against the United States."[127] The Supreme Court's answer to this contention was that "those provisions [of the Constitution concerning fundamental guarantees such as the writ of habeas corpus] have no relation to crimes committed without the jurisdiction of the United States against the laws of a foreign country."[128]

This principle of territorial sovereignty was later applied in *Holmes v. Laird*[129] in which American servicemen were tried in West Germany for the rape of a West German woman.[130] Because

124. S. LAZAREFF, STATUS OF MILITARY FORCES UNDER CURRENT INTERNATIONAL LAW 7 (1971).

125. *See, e.g.*, NATO SOFA, *supra* note 9, at art. VII(3) (authorizing trial in United States military courts of some offenses committed by United States citizens in foreign lands).

126. 180 U.S. 109 (1901).

127. *Id.* at 122.

128. *Id.* The court continued,

> In connection with the above proposition, we are reminded of the fact that the appellant is a citizen of the United States. But such citizenship does not give him an immunity to commit crime in other countries, nor entitle him to demand, of right, a trial in any other mode than that allowed to its own people by the country whose laws he has violated and from whose justice he has fled. When an American citizen commits a crime in a foreign country, he cannot complain if required to submit to such modes of trial and to such punishment as the laws of that country may prescribe for its own people, unless a different mode be provided for by treaty stipulations between that country and the United States.

Id. at 123.

129. 459 F.2d 1211 (D.C. Cir.), *cert. denied*, 409 U.S. 869 (1972).

130. Procedurally, the suit was brought in a United States District Court as a consequence of the servicemen leaving West Germany without authorization. When they returned to the United States they surrendered to Army officials who were obligated to return the men to West Germany under the NATO SOFA. NATO SOFA, *supra* note 9. Before the Army could act, the servicemen sued in federal district court to enjoin their return to West Germany.

their trial failed to comply with the constitutional standard of the Bill of Rights,[131] the servicemen maintained that they could not be forced to serve the sentences. The court, however, found *Neely* dispositive:

> What we learn from *Neely* is that a surrender of an American citizen required by treaty for purpose of a foreign criminal proceeding is unimpaired by an absence in the foreign judicial system of safeguards in all respects equivalent to those constitutionally enjoined upon American trials.[132]

Since the United States Constitution does not apply to foreign trials for foreign offenses, American offenders in foreign prisons have no basis for claiming that their trials failed to comply with the Bill of Rights.

The critical question, therefore, is whether United States enforcement of a sentence that is the product of a foreign criminal proceeding that lacked United States due process safeguards is sufficient involvement in the proceeding to render the Constitution applicable.[133] In *Pfeifer v. United States Bureau of Prisons* the district court addressed this governmental involvement issue.[134] In that case, petitioner argued that "the custody of an American citizen for service of a sentence imposed in culmination of an unfair foreign trial is a governmental involvement that the Constitution does not tolerate."[135] The court found *Holmes v. Laird*[136] controlling and concluded that "the Treaty does not run afoul of the Constitution simply because it provides for the incarceration in the United States of American [*sic*] citizens whose foreign trials did not comply with the Bill of Rights."[137] This same conclusion was reached by the Department of

131. Petitioners claimed they were denied a speedy trial, counsel of their choice, and a fair appeal. They also contended representation by German counsel was ineffective because of the language barrier and that they were not permitted to confront the witnesses. 459 F.2d at 1214.

132. 459 F.2d at 1219. *See also* Wilson v. Girard, 354 U.S. 524 (1957) (upholding delivery of a United States citizen to Japan for trial not complying with United States Constitution); United States v. Toscanino, 500 F.2d 267 (2d Cir. 1974).

133. A close analogy is the transfer of prisoners between or within state facilities in the United States. In an interstate transfer the sending state continues to have jurisdiction over the sentence, although carried out in the receiving state. The Western Interstate Corrections Compact, for example, specifically provides that "the receiving state [is] to act in that regard solely as agent for the sending state" and that proceedings concerning the sentence are to be the sole responsibility of the sending state. Western Interstate Corrections Compact, *reprinted in* CAL. PENAL CODE § 11190, art. IV(a) (Deering 1980). The practice of regarding the conviction and sentence as the "creature" of the sentencing state is clearly established. Vagts, *supra* note 120, at 333.

134. 468 F. Supp. at 921-24.

135. *Id.* at 922-23.

136. 459 F.2d 1211 (D.C. Cir.), *cert. denied,* 409 U.S. 869 (1972).

137. 468 F. Supp. at 924. The court concluded picturesquely,

> America is not vicariously liable for the acts of another nation. Consequently, as in *Holmes,* the fifth amendment permits the United States to enforce the sentences meted out by foreign courts, even if those sentences were 'unconstitutionally' procured. American custody of convicts originally tried and imprisoned in Mexico, as in Pfeifer's case, is simply another form of enforcing a foreign sentence.

Id.

State and the Department of Justice in hearings preceding the first prisoner transfer treaty.[138] Standing alone, the act of enforcing a sentence rendered in a foreign trial lacking constitutional safeguards does not sufficiently implicate the United States government in the conviction to entitle the prisoner to a new trial or to release.

C. Treaty Facially Unconstitutional Because Requires Invalid Waiver of Habeas Corpus

A third contention confronting the Turkish Treaty is that the transfer of prisoners is invalid because Articles IV and IX[139] require an invalid waiver of the constitutional right to habeas corpus. The *Velez* and *Preifer* decisions, however, evidence that the treaty would not entirely eliminate habeas corpus relief. Rather, the treaty eliminates a collateral attack on the Turkish conviction in the United States courts. This raises the question of whether the constitutionally guaranteed right of habeas corpus can be waived to this extent. Assuming the possibility of a waiver, the question remains whether the treaty requirements provide a valid waiver of the right to habeas corpus relief, *i.e.,* knowing, intelligent, and voluntary?[140]

Under the concept of territorial sovereignty discussed in the previous section, an offender tried in a foreign court for a foreign crime is not entitled to the protections guaranteed by the United States Constitution. While incarcerated in a foreign jail, the offender possesses no right to challenge his foreign conviction by habeas corpus in United States courts. Only upon return to the United States does

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138. *See Senate Foreign Relations Hearings, supra* note 14, at 82 ("[A]cceptance of the transfer of prisoners from Canada or Mexico would not represent such involvement in the prior proceedings in those countries as to render the Constitution of the United States applicable to them retroactively."); H.R. REP. No. 720, 95th Cong., 1st Sess. 51 (1977) (statement of Peter H. Flaherty, Deputy Attorney General, United States Department of Justice), *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 3146, 3173-74.

139. In addition, the implementing legislation provides,

> When a treaty is in effect between the United States and a foreign country providing for the transfer of convicted offenders — (1) the country in which the offender was convicted shall have exclusive jurisdiction and competence over proceedings seeking to challenge, modify, or set aside convictions or sentences handed down by a court of such country . . . .

18 U.S.C.A. § 3240 (West Supp. 1979).

The waiver of habeas corpus is not explicit in the Treaty or its implementing legislation. Before accepting enforcement of the penal judgment, the requested state must satisfy itself and specify in a decision that the transfer meets the conditions of articles III and IV. Turkish Treaty, *supra* note 1, at art. XXIII. One condition is that the transfer must be with "the consent of the sentenced person." *Id.* art. IV(f). The enabling legislation also specifically requires that the offender understand the consequences of the transfer before consenting, including the fact that he will not be able to challenge the foreign conviction or sentence in a United States court. 18 U.S.C.A. § 4108(b)(1) (West Supp. 1979). Although never explicitly labeled, this provision apparently serves as a waiver of the writ of habeas corpus. *See House Judiciary Hearings, supra* note 15, at 267.

140. For a detailed discussion of the waiver of habeas corpus, see Robbins, *A Constitutional Analysis of the Prohibition Against Collateral Attack in the Mexican-American Prisoner Exchange Treaty,* 26 U.C.L.A. L. REV. 1 (1978).

he actually acquire this right. The waiver provision, therefore, is a double protection for the United States and foreign court systems because even if the offender could be said to possess the right to collaterally attack through habeas corpus, he would have validly waived it.

1. Habeas Corpus is Waivable.—It is uncontroverted that one may waive a right to which he is otherwise entitled.[141] Accordingly, the right of habeas corpus was found waivable in the landmark case of *Fay v. Noia.*[142] In *Fay,* the defendant in a murder trial failed to appeal his conviction to a state court of appeals within the prescribed time limit and later sought a writ of habeas corpus in federal district court. The writ was denied on the ground that he failed to exhaust his state remedies within the meaning of federal statutory requirements.[143] The Court held that "the federal habeas judge may in his discretion deny relief to an applicant who has deliberately by-passed the orderly procedure of the state courts and in so doing has forfeited his state court remedies."[144] The federal remedy of habeas corpus may be waived if the applicant understandingly and knowingly "forwent the privilege of seeking to vindicate his federal claims in the state courts."[145]

The right of habeas corpus can also be waived by failure to comply with a state contemporaneous objection rule that, in essence, bars subsequent review of objections not raised during the original trial. In *Wainwright v. Sykes,*[146] a defendant being tried for third degree murder failed to challenge the admissibility of inculpatory statements made by himself to police officers. Subsequent to conviction, defendant initiated a habeas corpus action in federal district court asserting that his statements were inadmissible by reason of his lack of understanding of the *Miranda* warnings. The Supreme Court ruled that, absent a showing of cause for failing to object at trial and resultant prejudice, failure to follow the state's contemporaneous objection rule was a waiver of habeas corpus.[147] In *Wainwright,* habeas

141. *See, e.g.,* Pierce v. Somerset Ry., 171 U.S. 641 (1898). "A person may by his acts or omission to act waive a right which he might otherwise have under the Constitution of the United States as well as under a statute . . . ." *Id.* at 648. Significantly, the following rights have all been found waivable: the right to trial by jury, Boykin v. Alabama, 395 U.S. 238 (1969); the right to counsel, Faretta v. California, 422 U.S. 806 (1975); the right to confrontation, Brookhart v. Janis, 384 U.S. 1 (1966); and the right to be free from double jeopardy, Green v. United States, 355 U.S. 184 (1957).

142. 372 U.S. 391 (1963).

143. 28 U.S.C. § 2254 (1976).

144. 372 U.S. at 438.

145. *Id.* at 439.

146. 433 U.S. 72 (1977).

147. *Id.* at 90-91. "If a criminal defendant thinks that an action of the state trial court is about to deprive him of a federal constitutional right there is every reason for his following the state procedure in making known his objection." *Id.* at 90.

corpus was implicitly waived by an act of omission. The treaty goes a step further and requires that the right be explicitly waived by an act of commission.

2. Treaty Provides Valid Waiver.—Notwithstanding the allowance of a waiver, the treaty provisions for express consent must be examined to determine whether the treaty provides a valid waiver of the right in accordance with constitutional standards. The original test for a valid waiver, enunciated by the Court in *Johnson v. Zerbst,*[148] required that a waiver be knowing and intelligent. To that test, later cases have added a third element, voluntariness.[149]

(a) Knowing waiver.—The Turkish Treaty explicitly provides that both states must ensure that the sentenced person gave his consent to transfer.[150] The implementing legislation additionally requires that the offender's consent be personally verified as made "with full knowledge of the consequences thereof" by a United States magistrate or a specifically designated individual.[151] To ensure that the offender has full knowledge of the consequences of his consent, the legislation specifies that the verifying officer must inform him of the conditions under which the transfer may be made and determine that he understands them.[152] If a language problem exists, an interpreter is provided. The offender has the right to consult counsel and to have counsel appointed if he is financially unable to obtain an attorney.[153] In addition to these measures, the offender will have been previously provided a question and answer booklet dealing extensively with the operation of the Treaty.[154] Clearly, the procedures are designed to adequately inform the offender of the ramifications of his consent to transfer under the Turkish Treaty and fully satisfy the "knowing" requirement of a valid waiver.

(b) Intelligent waiver.—To ensure that the prisoner's consent to transfer is given intelligently, the implementing legislation directs that a verifying officer, usually a United States magistrate, must personally conduct verification proceedings with the offender and make necessary inquiries to determine that his consent is voluntary. These inquiries may be directed not only to the prisoner but also to any other person. The officer may consider any other documents or

148. 304 U.S. 458 (1938).
149. *See, e.g.,* Schneckloth v. Bustamonte, 412 U.S. 218, 248-49 (1973); Boykin v. Alabama, 395 U.S. 238, 242 (1969).
150. Turkish Treaty, *supra* note 1, at arts. IV(f), XXIII(b).
151. 18 U.S.C.A. § 4108(a) (West Supp. 1979).
152. *Id.* § 4108(b).
153. *Id.* § 4109.
154. INFORMATION BOOKLET, *supra* note 116. *See* note 63 *supra.*

physical evidence that will assist him in making the determination.[155] In addition, the offender has the opportunity to consult counsel before the final consent to transfer is given, which further ensures that the consent will be intelligently rendered.

(c) Voluntary waiver.—The third requirement of a valid waiver is that it be voluntarily given.[156] Congress attempted to guarantee as far as possible in the administrative setting that the offender's consent would actually be voluntary.[157] To ensure voluntariness, the procedure for verification of consent contained in the implementing legislation incorporates those safeguards against involuntary waivers utilized in the guilty plea setting in United States courts.[158] After a hearing in which the offender is assisted by counsel, a verifying officer must determine that the offender's consent is voluntary and "not the result of any promises, threats, or other improper inducements."[159] The entire proceeding is recorded and the offender's consent is noted on a form together with the verifying officer's affirmation that the consent is "wholly voluntary."[160] If followed, this procedure certainly satisfies the constitutional requirements of voluntariness in waiver situations.

Despite extensive procedural safeguards to ensure that the consent is voluntary, one thorny issue remains: can the offender voluntarily consent to transfer when he has no real choice? This issue was raised in Congress by Senator Griffin, who maintained that if the consent is inherently involuntary because no viable alternative to transferring exists, then it is invalid regardless of what procedures are employed.[161] This "no choice" argument is faulty because an

155. H.R. REP. NO. 720, 95th Cong., 1st Sess. 37 (1977), *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 3146, 3160.

156. *See, e.g.*, Boykin v. Alabama, 395 U.S. 238, 242 (1969). "It was error, plain on the face of the record, for the trial judge to accept petitioner's guilty plea without an affirmative showing that it was intelligent and voluntary." *Id.*

157. *See Senate Judiciary Hearings, supra* note 19, at 2, 25-26, 138; 123 CONG. REC. 24,272 (1977) (remarks of Senator Javits).

158. In the guilty plea setting courts have established several criteria for a valid waiver: the determination of waiver must be personally made by a judge, Boykin v. Alabama, 395 U.S. 238, 242-44 (1969); McCarthy v. United States, 394 U.S. 459, 464-67 (1969); the waiver may be made after consulting counsel, Tollett v. Henderson, 411 U.S. 258, 265 (1973); an affirmative showing must be made that the waiver is voluntary and knowing, Boykin v. Alabama, 395 U.S. 238, 242 (1969); the record must indicate that the waiver was knowing and voluntary, Johnson v. Zerbst, 304 U.S. 458, 465 (1938).

159. 18 U.S.C.A. § 4108(d) (West Supp. 1979).

160. *See* note 85 *supra* for the first part of the form. The verifying officer signs the following statement: "Based on the proceedings conducted before me, I find that the above consent was knowingly and understandingly given and is wholly voluntary and not the result of any promises, threats, coercion, or other improper inducements." Consent Verification Form, *supra* note 85.

161. 123 CONG. REC. 24,271 (1977) (individual views of Sen. Griffin).

> [The prisoner's] alternatives are incarceration in this country or continued confinement in Mexico. The alternative of remaining in Mexico is so unattractive to most prisoners that in reality these individuals are left with but one choice — incarceration

American citizen incarcerated in a foreign jail has no United States constitutional right to habeas corpus. He has the right of a citizen of that country to appeal or bring an action similar to habeas corpus in the foreign court. By accepting the offer to transfer conditioned upon the relinquishment of the capacity to bring habeas corpus based on the foreign conviction, he has surrendered no vested right.[162]

In addition, although the option to transfer has been labeled a "Hobson's Choice"[163] the prisoner does indeed have an alternative. Since twenty percent of those prisoners initially offered the opportunity to transfer from Mexican prisons decided to remain, a very real choice must exist.

Finally, the difficulty of the choice for a particular individual should not prevent the government from extending him the offer. Under the treaty, the government allows the prisoner to choose between staying in a foreign prison and returning to the United States on the condition that he not collaterally attack the foreign sentence or conviction. Although the choice is perhaps unpleasant, the government is permitted to pose it. In *Brady v. United States*[164] the Court decided that even when confronted with the possibility of a death penalty, a defendant could knowingly and intelligently plead guilty to a crime, fully aware that the guilty plea would automatically preclude the death sentence.[165] If a plea submitted in fear of the death penalty is not "inherently involuntary," a fortiori the consent to transfer given in fear of continued mistreatment in foreign jails is not inherently involuntary. Thus, an individual may be required to make a difficult choice, but his consent to transfer need not be characterized as inherently involuntary. Since the "no choice" argument fails, an offender may voluntarily waive the capacity to collaterally attack the foreign conviction or sentence.

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in this country. To deprive an individual of his right to challenge his Mexican conviction under such circumstances conflicts with fundamental notions of fairness.

Some commentators contend that this deficiency may be overcome by surrounding the consent or waiver process with various procedural safeguards . . . . It is difficult to perceive, however, how the implementation of these procedures will render the consent or waiver voluntary. In fact, such discussion obscures the crucial issue. *If the consent or waiver is deemed inherently involuntary, then it is invalid no matter what procedures are employed.*

Id. (emphasis added) (footnote omitted).

162. One commentator characterized the choice as follows:

Arguably, [the prisoner] only agrees not to acquire the right to habeas corpus by accepting American imprisonment. . . . In addition, by not receiving the benefits of confinement in the United States, the prisoner is neither gaining nor retaining the habeas corpus right. So, in one sense, the choice presented is to acquire the benefit and not the right, on the one hand, and to acquire neither the benefit nor the right, on the other hand.

Robbins, *supra* note 140, at 40. *See* notes 124-32 and accompanying text *supra.*

163. *See Senate Judiciary Hearings, supra* note 19, at 235.

164. 397 U.S. 742 (1969).

165. *Id.* at 748.

V. Conclusion

The Turkish Treaty is a positive step toward the amelioration of both international friction over foreign incarceration of nationals and the personal hardships attendant upon foreign imprisonment.[166] It faces potential difficulty if the Supreme Court adopts the *Velez* rationale, since it will be vulnerable to attack on grounds that a prisoner's consent to transfer was involuntary. The Second Circuit's reversal of *Velez* should be affirmed[167] and contentions that the treaty fails to guarantee due process[168] and that it is unconstitutional on its face[169] should be rejected by the courts, to allow this humanitarian treaty to succeed in its purpose.

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166. *See* notes 5, 22-24 and accompanying text *supra.*
167. *See* notes 106-22 and accompanying text *supra.*
168. *See* notes 124-38 and accompanying text *supra.*
169. *See* notes 148-65 and accompanying text *supra.*